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No._____

In the Supreme Court of the United States

October Term, 1986

KENNETH WALTON and JEAN WALTON, Petitioners

v.

STATE OF CALIFORNIA.

On Petition for Writ of Certiorari
To the Appellate Department of the
San Diego County Superior Court in the
State of California

PETITION FOR WRIT OF CERTIORARI

Thomas F. Homann
432 "F" Street, Suite 204
San Diego, California 92101
(619) 239-0707

Attorney for Petitioners

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QUESTION PRESENTED

In an obscenity investigation, may films be seized with a warrant which does not specifically identify individual items thought to be obscene but allows for confiscation of any material described only in general, categorical terms?

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The petitioners Kenneth Walton and Jean Walton respectfully pray that a writ of certiorari issue to review the judgment of the Appellate Department of the San Diego County Superior Court, State of California, rendered January 29, 1987.

OPINIONS BELOW

The judgment of the Appellate Department of the San Diego County Superior Court affirming the lower court is unreported and was rendered without opinion; it is included in the appendix at A-1. The oral decision of the Municipal Court reviewed by the Appellate Department is included in the appendix at A-2.

The orders of the California Court of Appeal, Fourth District, Division One and the California Supreme Court declining to review the case are included in the appendix at A-5 and A-6.

The March 2, 1987 order of the Appellate Department denying rehearing in the case is included in the appendix at A-7.

JURISDICTION

The judgment of the Appellate Department of the San Diego County Superior Court was rendered on January 29, 1987. A timely petition for rehearing was denied March 2, 1987. This petition is filed within 60 days of that date and is timely. This Court's jurisdiction is invoked under 28 United States Code section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 1: "Congress shall make no law . . . abridging the freedom of speech . . ."

United States Constitution, Amendment 4: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioners Kenneth Walton and Jean Walton have been convicted on a guilty plea of possessing obscene films for distribution in violation of California Penal Code section 311.2, subdivision (a). The case concerned certain video tapes located in and seized from the Waltons' home during a search conducted with a warrant.

In the San Diego County Municipal Court, the Waltons made a motion for return of property and to suppress the seized video tapes as evidence. The motion was denied and became the subject of an appeal to the Appellate Department of the San Diego County Superior Court.

By order dated January 29, 1987, the Appellate Department affirmed denial of the motion without opinion and rehearing was denied on March 2, 1987. Review thereafter was denied by the California Court of Appeal and the California Supreme Court.

The facts underlying the search and seizure are these:

On May 1, 1986, San Diego County Deputy Sheriff Robert M. Hoxter applied for a search warrant. The affidavit supporting the application recounts the following:

An investigator named Ackerman associated with the district attorney's office in Wallowa County, Oregon was conducting an investigation into "pornography." A suspect named Styles, contacted somewhere in the state of Michigan, gave Ackerman

an address for Mr. and Mrs. Walton in Escondido, California who he said were interested in sexual activity with animals. In January, 1986, Ackerman wrote the Escondido couple from Oregon and expressed his interest in bestiality. Mr. and Mrs. Walton responded by letter in late January.

Ackerman later obtained the Waltons' home telephone number. On April 20th he telephoned the Waltons. He reported Mr. Walton said he and his wife had had sex with animals and that they had video tapes showing animal sex. Ackerman also reported that during a telephone conversation with Mrs. Walton, she admitted having sex with animals and indicated they had video tape showing bestiality. Ackerman called Mrs. Walton again in April 28, 1986 and reported that she stated she and her husband would bring their tapes of animal sex to Oregon to copy and trade with Ackerman.[1]

Based on this showing, a warrant was issued to search the Waltons' home for the following:

a. Any writing bearing the name Kenneth W. Walton and/or Jean A. Walton.

b. Any photographs or video recording medium depicting the "suspect/suspects, in an act of

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[1] The balance of the affidavit recites at length Deputy Hoxter's training and experience in obscenity investigations and his beliefs regarding the habits, customs, and lifestyles of child molesters, pornographers, and persons involved in bestiality.

sexual assault upon an animal."

c. Any photographs or video recording medium constituting "obscene matter" involving sexual activity with animals described in paragraph b.

d. All exposed but undeveloped rolls of film.

e. Any writings with names or addresses of persons indicating an interest in the sexual assault of animals.

f. Any items showing dominion and control over the Waltons' home.

The search was conducted on May 2, 1986 by Deputy Hoxter and several others. Sixty-two video tapes were seized; none of the tapes were viewed before seizure and at least 39 proved not to contain depictions of bestiality. Numerous photographs and slides were taken, most not involving bestiality. Additionally, two video cassette players and other video camera equipment was taken along with numerous other items. A portion of the seized property was returned to the Waltons as a result of an agreement reached at the motion hearing.[2]

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[2] The only justification for the search and seizure offered by Deputy Hoxter and the prosecution was violation of the state obscenity laws. Petitioners were only charged with violation of the obscenity statute. Any possible criminal violation for sexual activity with animals was not considered cause for search by the police or prosecution.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to decide an important question dividing the federal circuits and the state courts: whether an obscenity warrant must identify individual obscene items to be seized or whether a generic description of obscene expression is sufficiently specific for First and Fourth Amendment purposes.

The warrant used to seize films from the Waltons' home did not identify any individual films either by name or by specific description. Instead, the warrant purported to authorize seizure of any pictures or films the executing officers considered to fall within a general category of sexually oriented expression. The terms of the warrant did not even limit the officers' discretion to seize material they deemed "obscene."[3]

The manner in which the warrant was executed indicates the officers did not feel constrained to seize only material containing scenes showing

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[3] Paragraph C of the warrant authorized seizure of any obscene material containing scenes showing a "sexual assault upon an animal," but Paragraph B authorized seizure of any material showing a "sexual assault upon an animal" without regard to the possible obscenity of the material. Since the only purpose for the warrant was to gather evidence of state obscenity violations, the description of items to be seized exceeded the legitimate scope of the investigation.

bestiality.[4] Sixty-two video tapes were seized from the Waltons' home on the purported authority of the warrant. None of the video tapes were viewed before being seized. (RT 16) Deputy Hoxter who led the search team admitted he did not know the contents of any of the videos when he decided which of them to take; instead, he confiscated all video tapes even when the boxes were unmarked and the tapes were apparently blank (Exhibit F-2) or when the tape boxes affirmatively indicated the film did not show bestiality (Exhibit F-1). (RT 13-15) Even though Deputy Hoxter indicated he felt the warrant only authorized seizure of bestiality depictions, he seized a collection of slides after viewing six or eight of the total which he discovered did *not* show bestiality; the decision to seize was based on what was described as a "possibility" other unexamined slides showed such conduct. (RT 24-26). He seized a stack of

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[4] Films or books containing a single description or depiction of bestiality are not necessarily obscene since the expression must be evaluated "as a whole" for serious value and patent offensiveness, *Miller* v. *California*, 413 U.S. 15, 24 (1973); a film showing bestiality may raise serious questions whether the depiction appeals to a prurient interest in sex or merely a curiosity with the bizarre. And in fact, *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 applied stringent First and Fourth Amendment requirements to a warrant for seizure of obscenity containing scenes of bestiality according to the warrant and affidavit in the case reprinted in *United States* v. *Guarino*, 729 F.2d 864, 881-885 (1st Cir., en banc, 1984).

magazines (Exhibit D), *none* containing any depictions of bestiality.

Confiscation of films and other expressive material from the Waltons' home implicated First as well as Fourth Amendment concerns since a seizure of presumptively protected expression results in a restraint of free speech. Accordingly, the Court has recognized "particularized rules applicable to searches for the seizure of allegedly obscene films, books and papers," *Maryland* v. *Macon*, 472 U.S. 463, 468 (1985), including a requirement that no seizure of presumptively protected expression may occur without a warrant. *Roaden* v. *Kentucky*, 413 U.S. 496, 504 (1973); *Heller* v. *New York*, 413 U.S. 483 (1973). And *Roaden*, 413 U.S. at 504 reiterated the rule from *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965) that "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain."

Speiser v. *Randall*, 357 U.S. 513, 525 (1958) explained the reason for "special constraints" and "scrupulous exactitude" when the power of search and seizure is used as an "instrument for stifling liberty of expression," *Marcus* v. *Search Warrant*, 367 U.S. 717, 729 (1961), since "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished is finely drawn . . . [and] the separation of legitimate from illegitimate speech calls for . . . sensitive tools."

A prime "sensitive tool" is a judicial determination of probable obscenity before expression straying outside First Amendment protection can be suppressed by seizure. Judicial supervision of any suppression of free expression is well recognized. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70-71 (1963), requiring a judicial decision to find the "dim and uncertain line" between protected and unprotected expression; *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965), requiring judicial determination before imposition of a prior restraint of suspected obscenity.

While *New York* v. *P. J. Video, Inc.*, 475 U.S. _____ (1986) rejected the notion a higher standard of probable cause applies to seizure of possibly obscene expression, the case embraces the holding of *Heller* v. *New York, supra*, 413 U.S. at 492-493 that a neutral magistrate must make a prior judicial determination of probable obscenity before a seizure may occur.

No determination of the probable obscenity of any specific films or pictures at the Waltons' home was made by the magistrate since the content of individual items was unknown. Therefore, the warrant did not designate any identified films or photographs to be seized, but left the evaluation of what constituted illegal expression to the executing officers. This is precisely the flaw found in the invalid warrant of *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 325 (1970).

The constitutional requirement a warrant particularly describe the things to be seized must be strictly applied when alleged obscenity is

confiscated. A warrant to seize items thought to be obscene cannot describe the items in generic terms but must identify each separate article by title or other unique characteristic. Otherwise there is no assurance the safeguards of *Heller* v. *New York*, *supra*, an "independent judicial determination of probable cause prior to issuing the warrant" with a searching focus on the question of obscenity (413 U.S. at 488-489), has been satisfied.

This Court has never sanctioned seizure of presumptively protected but allegedly obscene material with a warrant that did not specifically identify the individual items considered obscene. Since an executing officer is not deemed qualified to determine whether individual items may or may not be obscene, *Lee Art Theater* v. *Virginia*, 392 U.S. 636, 637 (1968), a warrant directing seizure of all "obscene publications" without naming individual books is invalid, *Marcus* v. *Search Warrant*, *supra*, 367 U.S. 717, as is a warrant to seize films and magazines "similar" to specifically identified obscene items. *Lo-Ji Sales, Inc.* v. *New York*, *supra*, 442 U.S. 319.

Certiorari should be granted to consider the important question of whether the requirement for a prior judicial determination of probable obscenity is satisfied when a warrant has been issued which designates no individual items for seizure but gives authority to police executing the warrant to evaluate the content of books and films and exercise discretion to determine what should be taken.

Federal circuit courts have reached differing conclusions on the question whether a generic warrant is permitted in an obscenity investigation. *United States* v. *Guarino*, 729 F.2d 864 (1st Cir., en banc, 1984) held a warrant to seize obscenity without identifying individual items was invalid while *Sequoia Books, Inc.* v. *McDonald*, 725 F.2d 1091 (7th Cir., 1984) approved a similar generic warrant for seizure of items suspected of being obscene. See also *Sovereign News Co.* v. *United States*, 690 F.2d 569, 576 (6th Cir., 1982); *United States* v. *Sherwin*, 572 F.2d 196 (9th Cir., 1977); and *United States* v. *Nader*, 621 F.Supp. 1076 (D.C. D.C., 1985) compared with *Matter of Property, etc.*, 644 F.2d 1317 (9th Cir., 1981); and see *United States* v. *Marti*, 421 F.2d 1263 (2nd Cir., 1970). Similarly, some state courts have held that generic obscenity warrants satisfy the particularity requirement of the Fourth Amendment, e.g., *Clifford* v. *State*, 474 N.E.2d 963 (Ind. Sup. Ct., 1985); *Century Theaters, Inc.* v. *State*, 625 S.W.2d 511 (Ark. Sup. Ct., 1981); *Village Books* v. *State*, 323 A.2d 698 (Md. Ct. Spec. Apls., 1974), while other state courts have required obscenity warrants to identify individual items. E.g. *Aday* v. *Superior Court*, 362 P.2d 47 (Cal. Sup. Ct., 1961); *People* v. *Superior Court (Freeman)*, 534 P.2d 393 (Cal. Sup. Ct., 1975); *Jefferson Parish* v. *Bayou Landing*, 350 So.2d 158 (La. Sup. Ct., 1977); *Anthony* v. *Carter*, 541 S.W.2d 157 (Tenn. Sup. Ct., 1976).

Certiorari is appropriate to consider and resolve these conflicts.

CONCLUSION

For the reasons set forth above, this petition for certiorari should be granted.

April, 1987

Respectfully submitted,

THOMAS F. HOMANN

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO
APPELLATE DEPARTMENT
Case No. CR 82344

The People of the State of California,
Plaintiff,

v.

Kenneth Walton and Jean Walton,
Defendants.

Order, January 29, 1987

The judgment of the lower court is unanimously affirmed.

/s/Ben W. Hamrick, P.J.
Gilbert Nares, J.
Laura Hammes, J.

IN THE MUNICIPAL COURT
NORTH COUNTY JUDICIAL DISTRICT
COUNTY OF SAN DIEGO, STATE OF CALIFORNIA
Case No. H 27993

The People of the State of California,
Plaintiff,

v.

Kenneth Walton and Jean Walton,
Defendants.

Transcript, pages 38-40, June 20, 1986

The Court: Usually in the obscene film cases, we are dealing with commercially-produced films that contain a mixture of socially redeeming scene and scene that are not socially redeeming. Here we are dealing with a different type of film where I believe at the time that the warrant was executed and still at this time, that certain things can be described that exceed the limits of acceptable conduct, aa least in my belief of the standards of the community, and not particularly the standards of the community but acceptable conduct does not encompass sexual conduct with animals. I also think that that type of conduct has no redeeming social value, in my opinion.

I think in regard to the descriptions set forth in the affidavit is sufficient to establish probable cause for the seizure of the films that are depicted in the warrant.

The next step, getting to the point raised by Mr. Williams is, did the officers go well beyond the intent of the search warrant. Here I think you must measure the officer's act in the confines of what is reasonable and what is unreasonable. The problem facing an officer, any officer, this officer or anyone else, is he may see a film and the box says, "Mary Poppins," but what is inside or what is in the last half of the film, no one knows until you sit down and view the film from one end to the other.

Because of the number of films that we are dealing with, two, three, or four or five films, I think it would have been reasonable for him to sit down and look at those films before seizing them. When we are talking about the potential of the number of hours involved in this particular case, I think it would be -- the standards that we set them as requiring the officer to review all those films before taking them would be unreasonable. I think it was reasonable in this case, based on two things.

One. Evidence he did find that there was some films involving bestiality.

Two. The comment which was not objected to, and I assumed to be a spontaneous comment, "Take them all," or words to that effect, that comment combined with what was viewed, plus the titles would be reasonable as far as the officer is concerned to take them all for later viewing.

The equipment. Part of the basis for the

search warrant was to establish potential for a felony. Possession of the films, as so aptly pointed out, is, at best, a misdemeanor. A felony, if one existed, came from the possible distribution. Therefore, the items necessary to establish either original production, reproductions, or a number of quantity of a certain film, implying production or whatever evidence a trier of fact may find necessary to establish whether there is distribution, would be necessary and reasonable. I think it is obvious from what we have heard from the testimony that there are some items that were taken that later was determined to be not necessarily related to any criminal activity.

COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE
Case No. D005949

Kenneth Walton, et al.,
Petitioners,

v.

Superior Court, etc.,
Respondent;

People, Real Party in Interest.

Order, March 11, 1987

THE COURT: The petition for writ of mandate or prohibition and request for stay has been read and considered by Justices Work, Butler and Todd. The petition is denied as there is no showing the appellate department abused its discretion in failing to certify the matter to this court. (Cal. Rules of Court, rule 63.)

/s/Work
Acting Presiding Justice

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
In Bank
Case No. 4/1 D005949 - S000322

Kenneth Walton, et al.,
Petitioners,

v.

Superior Court, etc.,
Respondent;

People, Real Party in Interest.

Order, March 23, 1987

Application for stay and petition for review DENIED.

Lucas
Chief Justice

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO
APPELLATE DEPARTMENT
Case No. CR 82344

The People of the State of California,
Plaintiff,

v.

Kenneth Walton and Jean Walton,
Defendants.

Order, March 2, 1987

Appellant's Petition For Rehearing and Application For Certification to Court of Appeal is denied.

/s/Ben W. Hamrick, P.J.
Gilbert Nares, J.
Laura Hammes, J.